

**Introduced by Senator Machado  
(Principal coauthor: Senator Perata)**

January 7, 2008

---

An act to amend Section 10148 of, to add Sections 10131.9, 10131.91, 10131.92, 10131.93, and 10131.95 to, and to repeal Section 10131.8 of, the Business and Professions Code, relating to real estate.

LEGISLATIVE COUNSEL'S DIGEST

SB 1053, as introduced, Machado. Real estate: brokers and salespersons.

Existing law, the Real Estate Law, provides for the licensure and regulation of real estate brokers and real estate salespersons by the Real Estate Commissioner, and makes a willful violation of that law a crime. Existing law authorizes the commissioner to, upon his or her own motion, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within the state.

This bill would authorize the commissioner to inspect and examine or audit the business documents and records of a real estate broker or salesperson who, among other things, makes, arranges, or services loans secured by residential real property, at any time without prior notice, the cost of which would be paid by the broker or salesperson examined, as specified.

Existing law defines a real estate broker as a person who, among other things, solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity. Existing law requires a real estate broker engaging in that activity who meets certain criteria to annually notify the Department of Real Estate in writing.

This bill would delete that notification requirement and instead require a real estate broker who, among other things, makes, arranges, or services loans secured by residential real property to notify the department in writing, as specified, and to pay specified penalties for failing to provide that notification. The bill would require that broker to file various reports with the department, would authorize the commissioner to cause an examination and report to be made if the broker fails to timely file those reports, and would require the broker to notify the department when he or she is no longer subject to those reporting requirements. The bill would also require that broker to keep documents and records that will enable the commissioner to determine whether specified functions performed by the broker comply with the Real Estate Law. The bill would require the commissioner to examine the affairs of these brokers, and the brokers and salespersons acting under them, for compliance with the Real Estate Law, as specified, and would authorize the commissioner to impose penalties against those brokers or salespersons based on the findings of those examinations. The bill would enact other related provisions.

The bill would require that the penalties collected pursuant to its provisions be deposited into the Recovery Account in the Real Estate Fund and be available for expenditure, as specified, upon appropriation by the Legislature.

Because a willful violation of provisions of the bill would be a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 10131.8 of the Business and Professions
- 2 Code is repealed.
- 3 ~~10131.8. (a) A real estate broker who acts pursuant to~~
- 4 ~~subdivision (d) of Section 10131 and who meets all of the~~
- 5 ~~following requirements shall notify the department annually in~~
- 6 ~~writing on a form that is acceptable to the commissioner.~~

1     ~~(1) The real estate broker is an approved lender for the Federal~~  
2     ~~Housing Administration, Veterans Administration, Farmers Home~~  
3     ~~Administration, Government National Mortgage Association,~~  
4     ~~Federal National Mortgage Administration, or the Federal Home~~  
5     ~~Loan Mortgage Corporation.~~

6     ~~(2) The real estate broker makes residential mortgage loans to~~  
7     ~~a loan applicant for a residential mortgage loan by using or~~  
8     ~~advancing the broker's own funds, or by making a commitment~~  
9     ~~to advance the broker's own funds.~~

10    ~~(3) The real estate broker makes the credit decision in the loan~~  
11    ~~transaction.~~

12    ~~(4) The real estate broker at all times maintains a tangible net~~  
13    ~~worth, computed in accordance with generally accepted accounting~~  
14    ~~standards, of a minimum of two hundred fifty thousand dollars~~  
15    ~~(\$250,000).~~

16    ~~(b) As used in paragraph (2) of subdivision (a), "own funds"~~  
17    ~~means (1) cash, corporate capital, or warehouse credit lines at~~  
18    ~~commercial banks, savings banks, savings and loan associations,~~  
19    ~~industrial loan companies, or other sources that are liability items~~  
20    ~~on the real estate broker's financial statements, whether secured~~  
21    ~~or unsecured, or (2) cash, corporate capital, or warehouse credit~~  
22    ~~lines at commercial banks, savings banks, savings and loan~~  
23    ~~associations, industrial loan companies, or other sources that are~~  
24    ~~liability items on the financial statements of an affiliate of the real~~  
25    ~~estate broker, whether secured or unsecured. "Own funds" does~~  
26    ~~not include funds provided by a third party to fund a loan on~~  
27    ~~condition that the third party will subsequently purchase or accept~~  
28    ~~an assignment of the loan.~~

29    SEC. 2. Section 10131.9 is added to the Business and  
30    Professions Code, to read:

31    10131.9. (a) A real estate broker who acts pursuant to Section  
32    10131.1 or subdivision (d) or (e) of Section 10131, and who makes,  
33    arranges, or services loans secured by real property containing one  
34    to four residential units, shall notify the department within 30 days  
35    of the effective date of this section or upon commencing that  
36    activity, whichever is later. The notification shall be made in  
37    writing on a form that is acceptable to the commissioner.

38    (b) A real estate broker who fails to notify the department  
39    pursuant to subdivision (a) shall be assessed a penalty of fifty  
40    dollars (\$50) per day for each day written notification has not been

1 received, up to and including the 30th day after the first day of the  
2 assessment penalty. On and after the 31st day, the penalty is one  
3 hundred dollars (\$100) per day, not to exceed a total penalty of  
4 ten thousand dollars (\$10,000), regardless of the number of days,  
5 until the department receives the written notification.

6 (c) The commissioner may suspend or revoke the license of a  
7 real estate broker who fails to pay a penalty imposed pursuant to  
8 this section. In addition, the commissioner may bring an action in  
9 an appropriate court of this state to collect payment of that penalty.

10 (d) All penalties paid or collected under this section shall be  
11 deposited into the Recovery Account of the Real Estate Fund and  
12 shall, upon appropriation by the Legislature, be available for  
13 expenditure for the purposes specified in Chapter 6.5 (commencing  
14 with Section 10470).

15 SEC. 3. Section 10131.91 is added to the Business and  
16 Professions Code, to read:

17 10131.91. (a) A real estate broker who acts pursuant to Section  
18 10131.1 or subdivision (d) or (e) of Section 10131, and who makes,  
19 arranges, or services loans secured by real property containing one  
20 to four residential units, shall annually file with the department all  
21 of the following reports, as applicable, within 90 days after the  
22 end of the broker's fiscal year or within any additional time as the  
23 commissioner may allow for filing for good cause:

24 (1) The report of a compliance review by a licensed California  
25 independent public accountant, which shall be submitted for every  
26 broker's license under which a residential mortgage loan is made,  
27 arranged, or serviced during the fiscal year. The compliance review  
28 shall provide an independent evaluation of whether the activities  
29 conducted under the license were performed in accordance with  
30 applicable laws and regulations.

31 (2) If the broker establishes one or more trust fund accounts  
32 with an aggregate value of at least two hundred fifty thousand  
33 dollars (\$250,000) during the course of the fiscal year pursuant to  
34 Section 10145, the report of a review by a licensed California  
35 independent public accountant of trust fund financial statements,  
36 conducted in accordance with generally accepted accounting  
37 practices, which shall include within its scope the following  
38 information for the fiscal year relative to the business activities of  
39 the broker:

1 (A) The receipt and disposition of all funds of others to be  
2 applied to the making of loans and the purchasing of promissory  
3 notes or real property sales contracts.

4 (B) The receipt and disposition of all funds of others in  
5 connection with the servicing by the broker of the accounts of  
6 owners of promissory notes and real property sales contracts  
7 including installment payments and loan or contract payoffs by  
8 obligors.

9 (C) A statement, as of the end of the fiscal year, which shall  
10 include an itemized trust fund accounting of the broker and  
11 confirmation that the trust funds are on deposit in an account, or  
12 accounts, maintained by the broker at a financial institution.

13 (3) A business activities report, which shall include within its  
14 scope, at a minimum, all of the following information for the fiscal  
15 year relative to the business activities of the broker and those of  
16 any other brokers and real estate salespersons acting under that  
17 broker's supervision:

18 (A) The names and license numbers of the real estate brokers  
19 and real estate salespersons acting under the broker's supervision.

20 (B) The numbers and types of loans brokered or made, the  
21 aggregate dollar values of each type of loan, the range of interest  
22 rates charged on the loans, the lenders of record on the loans, and  
23 the dispositions of the loans, if known.

24 (C) The number and aggregate dollar amounts of late payment  
25 charges, prepayment penalties, and other fees or charges collected  
26 and retained by the broker while acting in a lending or servicing  
27 capacity.

28 (D) Default and foreclosure experience in connection with loans  
29 brokered, serviced, or made by the broker.

30 (E) Commissions received by the broker for services performed  
31 as an agent in negotiating loans and sales of promissory notes and  
32 real property sales contracts.

33 (F) Aggregate costs and expenses, as referred to in Section  
34 10241, paid by borrowers to the broker.

35 (b) The commissioner shall adopt regulations prescribing the  
36 form and content of the reports described in subdivision (a) with  
37 appropriate categories to provide a better understanding of the  
38 business conducted by the broker.

39 (c) A broker subject to this section and Section 10232.2 may  
40 file consolidated reports that include all of the information required

1 under this section and Section 10232.2. Those consolidated reports  
2 shall clearly indicate that they are intended to satisfy the  
3 requirements of both sections.

4 (d) If a broker subject to this section fails to timely file the  
5 reports required under this section, the commissioner may cause  
6 an examination and report to be made and may charge the broker  
7 one and one-half times the cost of making the examination and  
8 report. In determining the hourly cost incurred by the commissioner  
9 for conducting an examination and preparing the report, the  
10 commissioner may use the estimated average hourly cost for all  
11 department audit staff performing audits of real estate brokers. If  
12 a broker fails to pay the above amount within 60 days of the  
13 mailing of a notice of billing, the commissioner may suspend the  
14 broker's license or deny renewal of that license. The suspension  
15 or denial shall remain in effect until the above amount is paid or  
16 the broker's right to renew a license has expired. The commissioner  
17 may maintain an action for the recovery of the above amount in  
18 any court of competent jurisdiction.

19 (e) The reports described in this section are exempted from any  
20 requirement of public disclosure by paragraph (2) of subdivision  
21 (d) of Section 6254 of the Government Code. The commissioner  
22 shall annually make and file as a public record a composite of the  
23 annual reports and any comments thereon that are deemed to be  
24 in the public interest.

25 SEC. 4. Section 10131.92 is added to the Business and  
26 Professions Code, to read:

27 10131.92. (a) A real estate broker who acts pursuant to Section  
28 10131.1 or subdivision (d) or (e) of Section 10131, and who makes,  
29 arranges, or services loans secured by real property containing one  
30 to four residential units, shall keep documents and records that  
31 will properly enable the commissioner to determine whether the  
32 residential mortgage brokerage, servicing, and lending functions  
33 performed by the broker comply with this division and with all  
34 rules and orders made by the commissioner under this division.  
35 These documents shall include, at a minimum, the documents  
36 described in Section 10148. Upon request of the commissioner, a  
37 real estate broker shall file an authorization for disclosure to the  
38 commissioner of financial records of his or her licensed business  
39 pursuant to Section 7473 of the Government Code.

(b) Notwithstanding subdivision (a) of Section 10148, the business documents and records of real estate brokers described in subdivision (a) and real estate salespersons acting under those brokers are subject to inspection and examination or audit by the commissioner, at his or her discretion, at any time without prior notice. That real estate broker or salesperson shall, upon request by the commissioner and within the time period specified in that request, allow the commissioner, or his or her authorized representative, to inspect and copy any business documents and records. The commissioner may suspend or revoke the license of the broker or salesperson if he or she fails to produce documents or records within the time specified in the request.

(c) The cost of every inspection and examination or audit conducted pursuant to subdivision (b) shall be paid to the commissioner by the licensee examined and the commissioner may maintain an action for the recovery of these costs in any court of competent jurisdiction.

(d) In determining the cost of any inspection and examination or audit conducted pursuant to subdivision (b), the commissioner may use the estimated average hourly cost, including overhead, for all persons performing inspections and examinations or audits of licensees or other persons subject to this division for the fiscal year.

(e) Inspection and examination or audit reports prepared by the commissioner's duly designated representatives pursuant to this section are not public records. Those reports may be disclosed to the officers or directors of a licensee that is the subject of the report for the purpose of corrective action. That disclosure shall not operate as a waiver of the exemption specified in subdivision (d) of Section 6254 of the Government Code.

SEC. 5. Section 10131.93 is added to the Business and Professions Code, to read:

10131.93. (a) As often as the commissioner deems necessary and appropriate, the commissioner shall examine the affairs of each real estate broker who is required to file reports with the department pursuant to Section 10131.91 for compliance with this division. These examinations shall also include a review of the affairs of all real estate brokers and real estate salespersons acting under the supervision of each real estate broker who is required to file reports with the department pursuant to Section 10131.91.

1 The commissioner shall appoint suitable persons to perform these  
2 examinations. The commissioner and his or her appointees may  
3 examine the books, records, and documents of the licensee, and  
4 may examine the licensee's officers, directors, employees, or agents  
5 under oath regarding the licensee's operations. The commissioner  
6 may cooperate with any agency of the state or federal government,  
7 other states, agencies, the Federal National Mortgage Association,  
8 or the Federal Home Loan Mortgage Corporation. The  
9 commissioner may accept an examination conducted by one of  
10 these entities in place of an examination by the commissioner  
11 under this section, unless the commissioner determines that the  
12 examination does not provide information necessary to enable the  
13 commissioner to fulfill his or her responsibilities under this  
14 division.

15 (b) The commissioner shall provide a written statement of the  
16 findings of an examination conducted pursuant to subdivision (a)  
17 and shall issue a copy of that statement to the broker of record.

18 (c) The real estate broker whose affairs are examined pursuant  
19 to subdivision (a) shall pay, and the commissioner shall assess,  
20 the reasonable expenses of the examination consistent with the  
21 requirements of subdivision (d) of Section 10131.92. Those  
22 expenses shall include the expenses incurred in reviewing the  
23 affairs of the real estate broker and real estate salespersons acting  
24 under the supervision of that broker. The commissioner may  
25 suspend or revoke the license of any real estate broker who fails  
26 to pay these expenses. In addition, the commissioner may bring  
27 an action in an appropriate court of this state to collect payment  
28 of these expenses.

29 (d) The commissioner may impose a penalty against a real estate  
30 broker or real estate salesperson whose affairs are examined or  
31 reviewed pursuant to subdivision (a) based on the findings of the  
32 examination or review. The commissioner may suspend or revoke  
33 the license of a real estate broker or real estate salesperson who  
34 fails to pay that penalty. In addition, the commissioner may bring  
35 an action in an appropriate court of this state to collect payment  
36 of the penalty.

37 (e) Penalties collected pursuant to subdivision (d) shall be  
38 deposited into the Recovery Account of the Real Estate Fund and  
39 shall, upon appropriation by the Legislature, be available for

1 expenditure for the purposes specified in Chapter 6.5 (commencing  
2 with Section 10470).

3 (f) The statement of the findings of an examination conducted  
4 pursuant to this section shall belong to the commissioner and shall  
5 not be disclosed to anyone other than the licensee, law enforcement  
6 officials, or other state or federal regulatory agencies for further  
7 investigation and enforcement. Reports required of licensees by  
8 the commissioner under this division and results of examinations  
9 performed by the commissioner under this division are the property  
10 of the commissioner.

11 SEC. 6. Section 10131.95 is added to the Business and  
12 Professions Code, to read:

13 10131.95. A real estate broker shall notify the department when  
14 he or she is no longer subject to the reporting requirements of  
15 Section 10131.91. If a broker has already made reports required  
16 by Section 10131.91 within the year, he or she shall continue  
17 reports for that year, but shall notify the department prior to the  
18 expiration of that year that he or she will no longer be servicing  
19 or arranging loans for which reports are required. The department's  
20 records, including those which may be disclosed by calling the  
21 license information telephone number of the department, may then  
22 be appropriately updated.

23 SEC. 7. Section 10148 of the Business and Professions Code  
24 is amended to read:

25 10148. (a) ~~A~~ *Notwithstanding Section 10131.92*, a licensed  
26 real estate broker shall retain for three years copies of all listings,  
27 deposit receipts, canceled checks, trust records, and other  
28 documents executed by him or her or obtained by him or her in  
29 connection with any transactions for which a real estate broker  
30 license is required. The retention period shall run from the date of  
31 the closing of the transaction or from the date of the listing if the  
32 transaction is not consummated. After notice, the books, accounts,  
33 and records shall be made available for examination, inspection,  
34 and copying by the commissioner or his or her designated  
35 representative during regular business hours; and shall, upon the  
36 appearance of sufficient cause, be subject to audit without further  
37 notice, except that the audit shall not be harassing in nature.

38 (b) The commissioner shall charge a real estate broker for the  
39 cost of any audit, if the commissioner has found, in a final desist  
40 and refrain order issued under Section 10086 or in a final decision

1 following a disciplinary hearing held in accordance with Chapter  
2 5 (commencing with Section 11500) of Part 1 of Division 3 of  
3 Title 2 of the Government Code that the broker has violated Section  
4 10145 or a regulation or rule of the commissioner interpreting  
5 Section 10145.

6 (c) If a broker fails to pay for the cost of an audit as described  
7 in subdivision (b) within 60 days of mailing a notice of billing,  
8 the commissioner may suspend or revoke the broker's license or  
9 deny renewal of the broker's license. The suspension or denial  
10 shall remain in effect until the cost is paid or until the broker's  
11 right to renew a license has expired.

12 The commissioner may maintain an action for the recovery of  
13 the cost in any court of competent jurisdiction. In determining the  
14 cost incurred by the commissioner for an audit, the commissioner  
15 may use the estimated average hourly cost for all persons  
16 performing audits of real estate brokers.

17 SEC. 8. The Legislature finds and declares that Sections 4 and  
18 5 of this act, which add Sections 10131.92 and 10131.93,  
19 respectively, to the Business and Professions Code, impose a  
20 limitation on the public's right of access to the meetings of public  
21 bodies or the writings of public officials and agencies within the  
22 meaning of Section 3 of Article I of the California Constitution.  
23 Pursuant to that constitutional provision, the Legislature makes  
24 the following findings to demonstrate the interest protected by this  
25 limitation and the need for protecting that interest:

26 In order to allow the Department of Real Estate to fully  
27 accomplish its goals, it is imperative to protect the interests of  
28 those persons submitting information to the department to ensure  
29 that any personal or sensitive business information that this act  
30 requires those persons to submit is protected as confidential  
31 information.

32 SEC. 9. No reimbursement is required by this act pursuant to  
33 Section 6 of Article XIII B of the California Constitution because  
34 the only costs that may be incurred by a local agency or school  
35 district are the result of a program for which legislative authority  
36 was requested by that local agency or school district, within the  
37 meaning of Section 17556 of the Government Code and Section  
38 6 of Article XIII B of the California Constitution.